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No. 89-333

Supreme Court, U.S.
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In the Supreme Court

of the

United States

OCTOBER TERM, 1989

FOR ARGUMENT

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SUPREME COURT, U.S.

STATE OF CALIFORNIA,
Petitioner,

VS.

FEDERAL ENERGY REGULATORY COMMISSION, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

INTRODUCTION

In its reply brief, respondent Federal Energy Regulatory Commission (FERC) offers inconsistent interpretations of section 27 of the Federal Power Act (FPA). On the one hand, FERC argues that section 27 preserves only state laws recognizing "proprietary rights" in water. FERC Br. 14-17, 30-41. On the other hand, FERC argues that section 27 authorizes state regulation of hydropower uses only to the extent not inconsistent with the FERC license, and then argues that California's regulation is inconsistent with the FERC license here. FERC Br. 41-48. The first argument is that section 27 is limited to "proprietary rights" and does not authorize state regulation of water, and the second argument is that section 27 is *not* limited to "proprietary rights" but instead authorizes state regulation to the extent not inconsistent with FERC regulation. FERC purports to find both interpretations in the language and legislative history of section 27.

In *California v. United States*, 438 U.S. 645 (1978), this Court rejected both arguments in construing section 8 of the Reclamation Act of 1902, the precursor of section 27. This Court rejected the United States' "proprietary rights" argument because the legislative history made clear that Congress meant to authorize state regulation of water. 438 U.S. at 663-670. The Court rejected the United States' argument that state regulation in "conflict" with the Secretary of the Interior's operational plans is invalid, holding instead that state regulation is permissible to the extent not in conflict with "clear *congressional* directives." *Id.* at 668 n. 21, 672, & n. 25 (emphasis added). FERC makes virtually the same arguments that the *California* Court rejected in construing section 8. Because of the progenitive relationship between sections 8 and 27, the same arguments should be rejected here.

I. SECTION 27 INCLUDES STATE REGULATORY WATER LAWS AND IS NOT LIMITED TO STATE LAWS RECOGNIZING "PROPRIETARY RIGHTS"

A. California v. United States

FERC argues that the reference in section 27 to state laws relating to "control, appropriation, use, or distribution of water" is substantially limited by the reference to "irrigation," "municipal or other uses," and "vested rights," and that, under the principle of *ejusdem generis*, the entire provision applies only to state laws recognizing "proprietary rights." FERC Br. 14-17. Respondent

Rock Creek Limited Partnership ("Rock Creek") makes a similar argument, asserting that California laws are not applicable because the Rock Creek project does not affect "proprietary rights" recognized under appropriative or riparian principles. Rock Creek Br. 43-46.

In *California v. United States*, this Court rejected the "proprietary rights" argument in construing section 8 of the Reclamation Act of 1902. Section 8 provides, similarly to section 27, for non-interference with state laws relating to the "control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder." 43 U.S.C. § 372, 383. In *California*, the United States argued that, under the principle of *ejusdem generis*, the reference to "irrigation" and "vested rights" implies that the provision applies only to "vested" or "proprietary" rights. Brief for United States, *California v. United States*, at 36, 126, 132, No. 77-285, Oct. Term, 1977 (hereinafter "U.S. Br. *(California)*"). This Court rejected the argument, stating that section 8 "does, of course, provide for the protection of vested rights, but it also requires the Secretary [of the Interior] to comply with state law in the 'control, appropriation, use, or distribution of water.'" 438 U.S. at 674-675. Thus, the *California* Court distinguished between state laws relating to "control, appropriation, use, or distribution of water" and state laws recognizing "vested" or "proprietary" rights, holding that the former reference is greater than, and is not limited to, the latter. The Court specifically "disavow[ed]" the dicta of earlier decisions that had adopted the opposite view. *Id.* at 672-674, & n. 24; Pet. Br. 38. The Court stated that the United States' "proprietary rights" argument would "trivialize the broad language and purpose of § 8," 438 U.S. at 675, a characterization that equally applies to FERC's "proprietary rights" argument in the context of section 27.

Rock Creek argues that *California* is distinguishable because the Reclamation Act provides for "federal funding for irrigation projects" that have limited regional effects, and the FPA, conversely, establishes a "complete scheme of national regulation." Rock Creek Br. 35-36.[1] To the contrary, the Reclamation Act establishes a broad national program to reclaim the nation's arid

[1] In fact, federal reclamation projects are authorized for multiple purposes—municipal supply, hydropower, industrial and instream uses—and are not limited to "irrigation" uses. Act of Feb. 25, 1920, 41

lands, and accomplishes this goal by providing for federal construction and operation of reclamation projects that serve broad public needs.[2] The early proponents of the federal reclamation program, including President Theodore Roosevelt, emphasized that the program was necessary to further the "national" goal of reclaiming the nation's arid lands. 35 Cong. Rec. 6775 (1902) (President Roosevelt's annual message to Congress); *id.* at 2222 (Sen. Clark). Importantly, both the Reclamation Act and the FPA are concerned with development of water for specified economic purposes, and both create federal agencies that have responsibility over such development. If anything, the Reclamation Act involves greater national interests than the FPA, for the Reclamation Act provides for direct *federal* development of water and the FPA provides for federal regulation of *private* development. Thus, there is no basis for construing the preemptive effects of the FPA more broadly than the Reclamation Act, particularly because of the similarity of their anti-preemption provisions.[3]

Stat. 451, 43 U.S.C. § 521; see *California*, 438 U.S. at 651 (describing multiple purposes of New Melones Project).

[2] On the other hand, most of the nation's hydropower industry is located in the seventeen continental western states. Of the total national hydroelectric generating capacity for the electric utility industry, 74% of such capacity exists in these seventeen western states and 56% of such capacity exists in the states of California, Oregon and Washington alone. See Edison Electric Inst., "Statistical Yearbook of the Electric Utility Industry/1988," Section IV, at p. 31 (Nov. 1989); Pet. Br. 8 n. 2. Virtually all the public utilities that have filed amici briefs supporting the respondents are located in these seventeen western states.

[3] FERC argues that *California* is distinguishable because section 8 specifically requires the Secretary of the Interior to "proceed in conformity with" state law and no similar directive is found in section 27. FERC Br. 27. The obvious reason for the different phraseology is that section 8 applies to the Secretary of the Interior, who has general sovereign immunity from state law, and section 27 applies to private power companies, who do not have sovereign immunity. Moreover, contrary to FERC's argument, Congress did not regard the "proceed in conformity with" phrase as substantially affecting the meaning of section 8. As this Court noted in *California*, Senator Newlands, one of the sponsors of the reclamation bill, described an earlier bill that omitted the phrase as "identical in its provisions, though differing somewhat in phraseology," to the bill in its final form that included the phrase. 438 U.S. at 664 n. 19.

FERC argues that California does not have "proprietary" interests in fish because California does not authorize appropriation of water for instream fish needs. FERC Br. 42-43. In fact, all states, including California, have sovereign "proprietary" interests in navigable waters and fish resources under the equal footing doctrine, subject to Congress' paramount commerce and property powers. See, *e.g., Martin v. Waddell*, 41 U.S. 367, 410 (1842) (states have "dominion and property in navigable waters"); *McCready v. Virginia*, 94 U.S. 391, 394-395 (1876) (the states have "title" to and "ownership" of fisheries, in the nature of a "property right"); *Shively v. Bowlby*, 152 U.S. 1, 11 (1894) ("title and . . . dominion"); Pet. Br. 18-20. Indeed, the legislative history of section 27 indicates that Congress deferred to state water laws in part because of the states' "proprietary" interests in water. Pet. Br. 23, 25, 29. 34. California chooses to protect its "proprietary" interests in fish not by issuing permits for instream fish flows, but by requiring the State Board to consider fish needs in acting on appropriative permit applications. Cal. Water Code §§ 1253, 1255, 1257. In any event, section 27 is not limited to—and does not even mention—state "property" laws, but instead includes *all* state laws relating to "control, appropriation, use, or distribution" of water for "other uses." Under California law, instream fish flows are a "beneficial use" of water, Cal. Water Code §§ 1243, 1257, and therefore such flows consist of

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FERC also argues that *California* is distinguishable because FERC licensees have a "federal right of eminent domain" under section 21 of the FPA and the Secretary of the Interior does not have an equivalent federal right under the Reclamation Act. FERC Br. 27-28. In fact, section 7 of the Reclamation Act authorizes the Secretary to acquire water rights by condemnation. 32 Stat. 389-390 (1902). In *California*, this Court held that section 8 requires the Secretary to comply with state law in exercising his condemnation authority under section 7. 438 U.S. at 665 (Secretary must "purchase, appropriate, or condemn necessary water rights in strict conformity with state law"). Since section 8 requires the Secretary to comply with state law in exercising his condemnation rights, section 27 requires a private power company to comply with state law in exercising its condemnation rights. Thus, there is no distinction between the Reclamation Act and the FPA in this respect.

"other uses" under section 27. See also *Federal Power Comm'n v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 256 (1954) ("other uses" include hydropower uses). Hence, although California has "proprietary" rights here, such rights are not strictly relevant in construing the effect of section 27.

B. First Iowa

The respondents argue that this case is governed by *First Iowa Hydro-Electric Cooperative v. Federal Power Comm'n*, 328 U.S. 152 (1946), which upheld the "proprietary rights" argument in construing section 27. FERC Br. 11-14; Rock Creek Br. 10-18. The *First Iowa* analysis of section 27 was dictum because the Court actually held only that section 9(b) does not require a state water right as a "condition precedent or administrative remedy that must be exhausted before securing a federal license," 328 U.S. at 170, and the Court examined section 27 only for the purpose of distinguishing its "substantive" effects from the "informational" requirements of section 9(b). 328 U.S. at 175-178. Thus, *California v. United States* can be reconciled with *First Iowa* by holding that a hydropower project must acquire a state water right prior to diverting water but not prior to acquiring a FERC license, a reconciliation that, as the states' amici brief notes, is consistent with the legislative history of the FPA. Amici States Br. 4-8; Pet. Br. 32 n. 15, 42.

Signficantly, the respondents fail to respond to our argument that *First Iowa* specifically relied on section 8 of the Reclamation Act in construing section 27. According to *First Iowa*, section 27 "carries" the meaning of section 8 "into" the FPA. 328 U.S. at 176 n. 20. Since *California v. United States* rejected the "proprietary rights" argument in construing section 8, *California* rejected the premise of *First Iowa*'s analysis of section 27. The respondents make no reference to *First Iowa*'s linkage of sections 8 and 27.[4]

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[4] The Solicitor General argued in *First Iowa*, contrary to his argument here, that sections 8 and 27 should be construed congruently. FPC Br., at 39 n. 23, *First Iowa Hydro-Electric Cooperative v. Federal Power Comm'n*, No. 603, Oct. Term, 1945 ("A restricted construction of section 27 is supported by the legislative history of that Section which shows that it was derived from Section 8 of the Reclamation Law of 1902"). The Solicitor General made the same argument in *California v. United States*. U.S. Br. (*California*), at 23, 51-54, 129 (*First Iowa* is "closest analogous case"). To be sure, petitioner California in *California*

Most importantly, the *First Iowa* Court applied the wrong preemption standard in construing section 27. See Amici Council of State Governments Br. 28-29. The *First Iowa* Court stated that an overlapping federal and state permit system would be "unworkable" in light of FERC's "comprehensive" authority, 328 U.S. at 168, and that Congress must be presumed to have rejected an overlapping system "in the absence of an express provision for it." 328 U.S. at 167. More recently, however, this Court has rejected the argument that preemption "is to be inferred merely from the *comprehensive* character" of a federal regulation, stating that "[t]he subjects of modern social and regulatory legislation often by their very nature require intricate and complex responses from Congress, but without Congress necessarily intending its enactment as the exclusive means of meeting the problem." *New York Dept. of Social Services v. Dublino*, 413 U.S. 405, 407 (1973) (emphasis added). In particular, where the states have traditionally regulated the matter under their police powers, the Court starts with "the assumption that the historic police powers of the states were not to be superseded by the Federal Act unless that was the *clear and manifest purpose* of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (emphasis added). See also *California v. ARC America Corp., et al.*, ___ U.S. ___, 109 S.Ct. 1661, 1665 (1989). Thus, this Court has rejected the *First Iowa* view that Congress presumptively intends to preempt overlapping state systems, and has held instead that Congress presumptively does *not* intend to preempt state laws in areas traditionally regulated by the states.[5]

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sought to distinguish *First Iowa* on grounds that FERC's "comprehensive" authority indicates that state laws are not applicable. Pet. Rep. Br., at 16-17, *California v. United States*, No. 77-285, Oct. Term, 1977. Petitioner California asserted this argument without having researched the legislative history of the FPA, which unequivocally indicates that section 27 was modeled after section 8. The Solicitor General's analysis of the linkage between sections 8 and 27 in *First Iowa* and *California* more accurately reflects the legislative history than California's contrary assertion in *California*.

[5] FERC asserts that no court has questioned the validity of *First Iowa*. FERC Br. 22, 24. This Court, however, has held in other decisions—as in *First Iowa* itself—that sections 8 and 27 should be construed congruently because of the similarity of their language and purpose. *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 734 (1950) ("Congress' action [in enacting section 8] parallels that in" enacting section 27); *Federal Power Comm'n v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 255 (1954) (citing "parallel reasoning" in *Gerlach*—which interprets section 8—for conclusion that section 27 preserves water rights recognized under state law). The reasoning of these decisions supports the conclusion that, in light of *California*, section 27 is not limited to "proprietary rights."

FERC asserts that its preemption view is supported by *Federal Power Comm'n v. Oregon*, 349 U.S. 435 (1955), the so-called *Pelton Dam* case, in which this Court upheld the "constitutional and statutory authority of the FPC to grant a valid license for a power project on reserved lands of the United States." 349 U.S. at 444-445; FERC Br. 23. Oregon challenged FPC's authority to issue licenses that varied from state law on grounds that the Desert Land Act of 1877 made state law applicable on *public* lands. This Court rejected Oregon's argument on grounds that the Desert Land Act does not apply to *reserved* lands. 349 U.S. at 446-448. Although *Pelton Dam* employed broad language that was both unnecessary to the decision and unsupported in the legislative history, the decision considered only the scope of the FPC's constitutional and statutory licensing authority on reserved lands, and did not specifically consider the scope of state authority to issue permits in state proceedings, which is the issue raised here.

II. THE LEGISLATIVE HISTORY INDICATES THAT SECTION 27 AUTHORIZES THE APPLICATION OF STATE REGULATORY WATER LAWS TO HYDROPOWER PROJECTS

The respondents argue that California's interpretation of the legislative history is inaccurate. Rock Creek argues that the proponents of federal hydropower legislation were engaged in a protracted dispute with the western congressmen who opposed such legislation, and that the federal proponents finally prevailed. Rock Creek Br. 25-26. FERC argues, in a slightly different vein, that Congress at various times considered both a "narrow" savings provision limited to "proprietary rights" and a "broad" provision containing no such limitation, and that Congress finally adopted the "narrow" provision. FERC Br. 40-41. As we explain, the respondents misconstrue the nature of the dispute between the federal proponents and the western congressmen, and, more importantly, misconstrue the compromise that reconciled their interests.

1. Although the federal proponents prevailed in establishing a broad federal hydropower program, the western congressmen prevailed in preserving state water rights authority over hydropower projects. The Wilson Administration hydropower bill, which was eventually incorporated in S. 1419, Pet. Br. 31, originally contained no savings provision similar to that in section 27. Hearings Before the House Committee on Water Power Legislation, 65th Cong., 2d Sess., at 619-620 (1919) (hereinafter "Hearings") (Rep. Mondell); FERC Br. 39. The western congressmen argued that the administration bill should be amended to include a savings provision. Hearings, at 619-620 (Rep. Mondell). At the behest of the western congressmen, the congressional committee—by a narrow 8-7 vote—amended the administration bill to include section 27. 56 Cong. Rec. 9115 (1918) (Rep. Taylor) ("[A]fter strenuous efforts I succeeded by a vote of 8 to 7 in getting section 27 put into this bill"). Because of the addition of the savings provision, the western congressmen supported the bill and it was enacted into law. During the ensuing congressional debates, the western congressmen stated that the provision fully preserved state water rights authority and required hydropower projects to comply with state water laws. *E.g.*, 56 Cong. Rec. 9768 (Rep. Doremus) (power companies "will be obliged to operate under the laws of the various States"); *id.* at 9110 (Rep. LaFollette) (federal licensees must acquire "all concessions and necessary powers of the State or States"); *id.* at 9115 (Rep. Taylor) (section 27 is "copied from the reclamation act"); *id.* at 9902 (Rep. Raker) (the federal licensee "gets its rights by applying to the State for it"); *id.* at 9114 (Rep. Mondell) ("[T]he bill expressly disavows any intent or purpose of taking over control of the waters from the States"); Pet. Br. 31-34. No other congressmen, including the most avid proponents of a federal program, offered any different interpretation of the savings provision. Indeed, Senator Shields of Tennessee, one of the leading federal proponents, stated that the bill "fully recognizes the sovereignty of the States over navigable streams within their borders and the property rights in their waters," and that "[c]ompanies proposing to build dams for the development of water power or other purposes are required to first obtain authority to do so from the States where the dams are to be built and the plants located and operated." Hearings, at 883.[6]

Thus, contrary to the respondents' argument, the western congressmen prevailed rather than succumbed in their attempt to preserve state authority. Indeed, it is questionable whether the hydropower bill would have been enacted if the western congressmen's interests had not been accommodated. In effect, the federal proponents and the western congressmen reached a compromise that that provided for federal regulation of private development but preserved traditional state water rights authority over such development. This compromise removed the last major obstacle to the federal hydropower program. The respondents ask that this Court ignore this congressional compromise by disregarding one of its key elements.[7]

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[6] The respondents argue that the western congressmen opposed federal hydropower legislation and therefore that their interpretation of section 27 should be ignored. FERC Br. 41; Rock Creek Br. 19 n. 12. To the contrary, the western congressmen whose statements are cited in the text above—particularly Congressman Taylor, the author of section 27, and Congressman Mondell, the author of section 8 of the Reclamation Act—voted *for* the hydropower bill after section 27 had been added. 56 Cong. Rec. 10052-10053 (1918). Moreover, since the western congressmen were the primary drafters and supporters of section 27, their interpretation of its effects is highly relevant, particularly because their interpretation was uncontradicted by the federal proponents.

[7] The respondents cite statements of several federal advocates, including members of the Wilson Administration, who argued for a "national" hydropower program because only the federal government could effectively provide for hydropower development. FERC Br. 39; Rock Creek Br. 20-22, 24 n. 16. These statements reflect only Congress' commitment to provide for federal hydropower development, and do not explain the savings provision that was the basis of the compromise worked out between the federal proponents and the western congressmen.

Rock Creek selectively cites portions of the legislative history which emphasized the need to protect "vested rights," arguing that the savings provision is therefore limited to "vested rights." *E.g.*, 51 Cong. Rec. 14067 (1914) (Rep. Taylor) ("irrigation"); 59 Cong. Rec. 1041 (1919) (Sen. Nelson) ("irrigation"); Rock Creek Br. 28-29. In the same vein, FERC cites Congressman Ferris' thumbnail description of the individual provisions of his hydropower bill. 51 Cong. Rec. 13625 (1914) ("vested rights"); FERC Br. 33. These statements reflect Congress' concern to protect vested rights, but other statements not cited by the respondents,

2. Contrary to respondents' analysis, the major concerns of the federal proponents—and the major disagreements between them and the western congressmen—were unrelated to whether state water laws should apply to hydropower projects. Indeed, the federal proponents generally conceded that state water laws should apply because of the states' "proprietary" interests in water. Hearings, at 874, 883 (Sen. Shields) (power companies must comply with state laws because the states have "exclusive and absolute sovereignty, jurisdiction, and control" of water subject to federal navigation power); 51 Cong. Rec. 14139 (1914) (Rep. Mann) (withdrawing objection to savings provision because "so far as the State control of water, . . . of course we can not interfere with that"). The main concern of the federal proponents was to remove federal obstacles to hydropower development by concentrating all federal licensing authority in a single agency, rather than continue to have such authority dispersed among several federal agencies. 56 Cong. Rec. 9110 (1918) (Rep. LaFollette) ("The three working together [the Secretaries of War, Interior and Agriculture] can harmonize all questions involving Federal interests"); *id.* at 1313 (Sen. Shields) (describing public support for legislation to repeal "present laws upon our statute books which have prohibited water-power development").

For their part, the western congressmen generally supported, or at least were not averse to, a federal program that would coordinate all federal licensing authority, assuming of course that state water rights authority was preserved. *E.g.*, 56 Cong. Rec. 9108 (1918) (Rep. LaFollette); 51 Cong. Rec. 13630 (1914) (Rep. Mondell) ("Legislation relevant to such water-power development is needed"); see note 6, *supra*. The western congressmen, however, strongly objected to the hydropower bills advocated by

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including those in the text above, reflect Congress' broader concern to preserve the states' *sovereign* control of water and its intent to require hydropower projects to comply with state law. *E.g.*, Hearings, at 874 (Sen. Shields) ("The several sovereign States have the exclusive and absolute sovereignty, jurisdiction, and control of such waters . . . subject only to the paramount power of Congress to regulate commerce"); S. Rep. No. 66, 64th Cong., 1st Sess. 4-5 (1916) ("[T]he State owns and controls the use of the water flowing within the streams within its boundaries"); 51 Cong. Rec. 14071 (1914) (Rep. Seldomridge) ("The power company will have to come in and conform to the laws of the State").

the federal proponents because the bills provided for the assessment of water use fees against hydropower projects.[8] In the view of the western congressmen, the federal government lacked constitutional authority to impose the fees because the states "owned" the water. See note 8, *supra*. The dispute over the fees provision impeded federal hydropower legislation from 1914 until the FPA was enacted in 1920. See note 8, *supra*. The respondents cite portions of the legislative history relevant to this collateral dispute, suggesting that its resolution in favor of the federal proponents indicates that Congress meant to override state water rights authority.[9] To the contrary, this dispute had nothing to do with whether state water laws should apply to hydropower

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[8] President Theodore Roosevelt precipitated the debate over hydropower legislation in 1908 by declaring that he would approve no more congressional bills authorizing individual projects until Congress (1) provided a fixed term for hydropower licenses, (2) developed a comprehensive plan for development, and (3) provided for imposition of water use fees against licensed hydropower projects. 42 Cong. Rec. 4698 (1908) (Letter from President Roosevelt). The first two conditions were not highly controversial, but the third delayed hydropower legislation for the next twelve years. M. Whittaker, "The Federal Power Act and Hydropower Development: Rediscovering State Regulatory Powers and Responsibilities," 10 HARV. ENV. L. REV. 135, 148-149 (1986) ("[A] highly charged political impasse over the constitutionality of water use charges killed every bill"). The western congressmen strongly opposed the fees provision because, in their view, the states "owned" the water and therefore the federal government could not constitutionally impose the fees. S. Rep. No. 898, 63rd Cong., 3d Sess. 1 (1915); H.R. Rep. No. 61, 66th Cong., 1st Sess. 4 (1919); 59 Cong. Rec. 1040 (1920) (Sen. Nelson) ("The majority of the Senate held the view that . . . the Federal Government ought not to charge compensation for what is State property and not Federal property"); Hearings, at 874-883 (Sen. Shields) (arguing that Congress has constitutional power to impose fees notwithstanding state sovereign interests in water); Pet. Br. 27, & n. 13.

[9] For example, FERC asserts that Congressman Mondell opposed the original reclamation bill, H.R. 16673, because the savings provision, the precursor of section 27, "inadequately protected state prerogatives." FERC Br. 34. In fact, Congressman Mondell generally supported the need for federal legislation, and in the passage cited by FERC objected to the fees provision. 51 Cong. Rec. 13630-13631 (1914) (Rep. Mondell) ("Legislation relevant to such water-power development is needed," but legislation should not contain provision that "may lay an

projects and its resolution in favor of the federal proponents is irrelevant in explaining the meaning of section 27.

3. The legislative history also contradicts FERC's assertion that Congress adopted a "narrow" savings provision rather than a "broad" one. According to FERC's argument, the savings provision in S. 1419 that was enacted as section 27 included a specific reference to "vested rights," and this reference restricted the provision's scope to "vested rights" and thus rendered the provision a "narrow" one. FERC Br. 40-41. FERC contrasts this "narrow" savings provision with the provision in an earlier hydropower bill, H.R. 16673 as amended, that omitted the "vested rights" phrase and thus, in FERC's view, was a "broad" one. *Id.* In fact, the legislative history of both provisions indicates that Congress did not regard the inclusion or omission of the "vested rights" phrase as substantially altering the provision's broad effect. The phrase was deleted from the earlier hydropower bill by the provision's author, Congressman Taylor of Colorado, at the request of Congressman Mann of Illinois;[10] Congressman Taylor

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excise tax upon the use of the water which the people of the States own").

Rock Creek cites Senator King's statement opposing the Wilson Administration bill for the view that section 27 did not preserve state water rights laws. 59 Cong. Rec. 7778-7779 (1920) (Sen. King); Rock Creek Br. 22. In fact, Senator King's statement indicates only that some western representatives opposed *all* federal regulation of hydropower, unlike others, such as Congressmen Taylor and Mondell, who supported federal regulation to the extent not inconsistent with state water rights laws. See note 6, *supra*.

Rock Creek cites Congressman Raker's statement objecting to a proposed state "consent" provision in section 9(b) for the view that Raker supported the preemption view. Hearings, at 368 (Rep. Raker); Rock Creek Br. 23. In fact, Raker objected only to a proposal that would have required the project operator to acquire state water rights "before he can even come to" the federal commission. Hearings, at 368 (Rep. Raker). Congressman Raker thereafter sought to amend the bill to require an applicant only to file an "application" for a state water right before applying for a FERC license, and, as we noted in our opening brief, his amendment was defeated. Pet. Br. 33 n. 15.

[10] Congressman Mann offered an amendment to delete the savings provision in H.R. 16673, section 14, objecting that "[t]he provision says that any law that a state passes for any use of water shall prevail over this

stated, however, that the deletion "would not materially weaken the bill" and that the provision as amended "would make the Government and these water-power companies come in and acquire their water rights under our State laws the same as other people." 51 Cong. Rec. 14139 (1914) (Rep. Taylor). As we have noted, the congressional debates relating to the S. 1419 savings provision—which contained the "vested rights" phrase and thus, in FERC's view, was a "narrow" one—indicate that the savings provision in that form broadly preserved state water rights authority and required hydropower projects to comply with state law. *E.g.*, 56 Cong. Rec. 9110 (Rep. LaFollette); *id.* at 9768 (Rep. Doremus); *id.* at 9902 (Rep. Raker); *id.* at 9114 (Rep. Mondell); see page 8, *supra*.[11] Indeed, the only apparent purpose of the "vested rights" phrase was to accentuate the provision's broad effect by specifically protecting vested rights, and hence its purpose was not to *limit* the provision to "vested rights." 51 Cong. Rec. 14139 (Rep. Mondell) (objecting that deletion of "vested rights" phrase "would jeopardize vested rights"). In short, there were no "broad" or "narrow" alternatives of the savings provision. Rather, in Congress' view, the provision broadly preserved state

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law." 51 Cong. Rec. 14066-14067. Two days later, Congressman Mann, apparently having been lobbied to change his view, withdrew much of his objection, stating that "so far as the State control of water, . . . of course we can not interfere with that anyhow." *Id.* at 14139. Congressman Taylor, apparently having worked out a compromise with Congressman Mann in advance, then amended section 14 to delete the phrase "used in irrigation or for municipal or other uses, or any vested right acquired therein." *Id.* at 14139. As explained above, Congressman Taylor stated the amendment would not "materially" change the bill. *Id.* at 14139. As FERC notes, this phrase was also omitted from section 14 in H.R. 408 in the next session, but reappeared in S. 1419 and H.R. 3184, which incorporated the Wilson Administration bill. FERC Br. 39-40.

[11] FERC argues that Senator Myers, in describing the savings provision in S. 1419 as "similar to" the savings provision in H.R. 16673 as amended, was "incorrect" because the later bill included the "vested rights" phrase and the earlier one did not. 56 Cong. Rec. 10494 (Rep. Myers); FERC Br. 40 n. 34. In fact, Senator Myers' statement indicates that Congress did not regard the addition or deletion of the phrase as substantially changing the provision's effect.

water rights authority whether the "vested rights" phrase was included or not.

III. FERC'S "COMPREHENSIVE" AUTHORITY UNDER SECTION 10(a) DOES NOT SUPPORT ITS PREEMPTION ARGUMENT

The respondents argue that state regulation of hydropower projects would interfere with FERC's authority under section 10(a) to develop a "comprehensive plan for improving or developing a waterway or waterways." 16 U.S.C. § 803(a); FERC Br. 9, 18-22; Rock Creek Br. 10. According to their argument, the assertion of state authority would allow the states to "nullify" FERC's "balance" of competing needs, thus resulting in a "different project" or a potential "veto" of a project. *Id.* In *California v. United States*, this Court rejected a similar argument in construing section 8.[12]

The preemption question cannot properly be framed in terms of the effect of state regulation on FERC's "comprehensive" authority, because Congress has directly provided in section 27 that hydropower projects are subject to state laws relating to "control, appropriation, use, or distribution" of water. Thus, Congress has balanced the need for "comprehensive" federal regulation and the need to preserve traditional state water rights authority, and has struck the balance in favor of overlapping federal and state regulation. This dual regulatory system is similar to that under the Rivers and Harbors Act of 1899, 33 U.S.C. §§ 401, 403, which, as interpreted by this Court in *Cummings v. Chicago*, 188 U.S. 410, 431 (1903), provides for the "joint assent" of both the federal government and the states with respect to activities affecting both federal navigation interests and state water rights interests.[13] As

[12] In *California*, the United States argued that "Congress has recognized the need for unitary administration and ultimate administrative authority with respect to reclamation projects, and has given these functions to the Secretary of the Interior," who has "broad authority to operate and maintain reclamation projects." U.S. Br. (*California*), at 112, 114. This Court rejected the argument on grounds that Congress had specifically deferred to state water laws in section 8. 438 U.S. at 663-670.

[13] FERC makes the astonishing argument that *Cummings* did *not* hold that such navigation-affecting activities must fully comply with state water laws, FERC Br. 45, an argument that would enable the Army Corps of Engineers, in issuing a permit under the 1899 act, to override state water rights authority. *Cummings* plainly rejected the argument, holding that such activities must have the "joint assent" of both the federal and state governments. 188 U.S. at 431.

this Court has stated in another context, the federal permit is an "acknowledgement that the activity does not violate federal law, not an exemption from state licensing or police power requirements." *Organized Village of Kake v. Egan*, 369 U.S. 60, 63 (1962). Thus, FERC's predecessor, the Federal Power Commission, was correct in its contemporaneous view that "[t]he development of water power on the lands of the United States requires the approval of both the State and Federal Governments, the former granting the right to use the water, the latter the right to use the land." FPC, Fourth Annual Report, at 10-11 (1924); see Pet. Br. 35 n. 17; Amici States Br. 20-24.

In providing for dual federal and state regulation, Congress recognized the need to preserve state authority to comprehensively manage and regulate all water rights in individual river systems. The states cannot provide for coordinated management if hydropower projects are exempt from state laws that apply to all other users. FERC appears to argue that any "anomalies" in state water rights regulation are justified because of the need to achieve the "national" objectives of the FPA. FERC Br. 29. To be sure, hydropower development raises national concerns, and Congress acted pursuant to its commerce and property powers to address these national concerns. On the other hand, hydropower development raises significant state concerns as well. The allocation of water for hydropower uses limits availability of water for competing instream and consumptive uses that are regulated under state law. Amici States Br. 25. As this Court has noted, water rights are "highly interdependent" because many users compete for a limited supply. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 819 (1976). Because of this interdependency, a hydropower project located in, for example, California's Stanislaus River may have more in common with other water users in the Stanislaus than with a hydropower project in, for example, New York's Mohawk River, because the California project's uses are in competition with other instream and consumptive uses in the same river. Congress responded to these diverse federal and state concerns by providing for both federal

and state regulation of hydropower projects. It is neither inconsistent nor unusual for Congress to respond to diverse federal and state concerns by accommodating such concerns within the framework of dual systems. Pet. Br. 41 n. 22. Certainly the states have no incentive to impede hydropower development, for the states' citizens are the beneficiaries of such development. If the states were to impede development, Congress has paramount authority under its commerce powers and, in some instances, its property powers to override the state impediment. To date, Congress has not acted.[14]

Indeed, although section 10(a) requires FERC to consider the needs of individual projects in relation to a "comprehensive plan for improving or developing a waterway or waterways," FERC has no authority to develop a comprehensive plan regulating all water rights in an entire waterway. Under the FPA, FERC's jurisdiction is limited to hydropower uses and does not extend to non-hydropower consumptive uses—municipal, agricultural and industrial uses—that compete with hydropower uses for water.[15] Therefore, FERC does not develop "comprehensive" plans for entire waterways, but instead considers individual project needs on a case-by- case basis. "Martha O. Hesse Nomination," Hearing Before the Committee on Energy and Natural Resources, U.S. Senate, 100th Cong., 1st Sess. 171 (July 9, 1987) (testimony of FERC chairwoman) ("Commission is [not] authorized to 'plan' a waterway in the sense of issuing a 'plan' that determines what all the various uses of the waterway should be"); States Amici Br. 27. The states, on the other hand, have jurisdiction over *all* competing uses in a river system and, particularly in

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[14] FERC argues that Congress accommodated state interests by allowing the states to participate in FERC proceedings and to request FERC to apply state law. FERC Br. 21-22. Apart from the fact that this result would surrender the states' sovereign interests in regulating hydropower development to a federal agency that, as in this case, has not always been responsive to state concerns, section 9(b) of the FPA already affords that remedy to the states, and thus FERC's argument would render section 27 a nullity.

[15] Hence, although FERC argues that it is required to "consider" hydropower needs in relation to "water supply" and "irrigation" needs, FERC Br. 26-27, FERC has no jurisdiction to actually allocate water for such water supply and irrigation needs.

recent years, have exercised this authority to provide for comprehensive management and regulation of all water rights. *National Audubon Society v. Superior Court*, 33 Cal.3d 419, 444 (1983). Thus, the states, which have traditionally regulated water rights, are best qualified to develop comprehensive management plans for entire river systems, and in any event bring to the regulatory process a set of legitimate concerns that are beyond FERC's jurisdiction. In enacting section 27, Congress preserved the states' traditional management authority in the specific context of hydropower development. Thus, section 10(a) requires FERC to look beyond hydropower needs, but does not diminish state authority to provide for coordinated management of all rights.

Since Congress has directly answered the preemption question by enacting section 27, it is impermissible to infer preemption from FERC's "comprehensive" authority, whatever the scope of such authority. Amici Council of State Governments Br. 6-9, 16-17, 27. Even in ordinary preemption cases, as we have noted, this Court does not infer preemption from the "comprehensive" nature of federal regulation, particularly where the states have traditionally regulated the matter under their police powers. *New York Dept. of Social Services v. Dublino*, 413 U.S. 405, 407 (1973); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); see page 6, *supra*. Such an inference is particularly inappropriate where Congress has adopted a specific anti-preemption provision, for Congress has already determined that state regulation does not "conflict" with federal law or stand as an "obstacle" to its purposes. The preemption inquiry is ultimately one of congressional intent, and Congress has specifically manifested its intent in section 27.

IV. THERE IS NO CONFLICT BETWEEN STATE AND FEDERAL FLOW REQUIREMENTS HERE, AND ANY SUCH CONFLICT IS IMMATERIAL IN ANY EVENT

FERC argues that, although California has the right to apply regulations that are not in "conflict" with FERC regulations, California's instream flow requirements "conflict" with the FERC requirements because they strike a different "balance" between hydropower and instream needs. FERC Br. 41-48. As we have noted, FERC's argument is inconsistent with its argument that

section 27 is limited to "proprietary rights," an argument that would preclude *any* state regulation of hydropower uses.

In any event, it is immaterial whether California's flow requirements conflict with the FERC requirements. In *California v. United States*, this Court held that section 8 authorizes the application of state laws to the extent not in conflict with "clear *congressional* directives." 438 U.S. at 672, & n. 25, 668 n. 21 (emphasis added).[16] Therefore, the proper inquiry is whether state law conflicts with a *congressional* directive, not with the federal *administrative* license. Indeed, in *California*, the United States and California agreed that the State Board conditions were inconsistent with the Secretary of the Interior's operational plans for the New Melones Project. This Court disregarded the conflict, holding that the specific congressional directive requiring compliance with state law is limited only by equally specific congressional directives establishing substantive reclamation policies. See note 16, *supra*. Thus, section 27 tolerates conflicts between federal and state licensing authority, providing not that conflicts are resolved in favor of federal authority but rather that hydropower projects must gain the "joint assent" of both the federal and state governments as a condition of operation. Cf. *Cummings*, 410 U.S. at 431.

Moreover, California's flow requirements do not conflict with the FERC requirements. California's requirements are higher than, and thus encompass, the FERC requirements. FERC argues that its requirements strike a "balance" between hydropower

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[16] The respondents argue that section 10(a), in authorizing FERC to exercise "comprehensive" planning authority, is a "clear congressional directive" that, within the meaning of the *California* decision, preempts state water laws. FERC Br. 28; Rock Creek Br. 38-40. This argument would stand the *California* decision on its head by precluding virtually all state regulation of water. In *California*, this Court held that state authority is limited by specific *substantive* congressional reclamation directives, such as the appurtenancy requirement in section 8 and the acreage limitation in section 5. 438 U.S. at 668 n. 21. The *California* Court rejected the United States' argument that the Secretary of the Interior's general authority to "operate" reclamation projects effectively preempts all state regulation of such projects. *Id.* at 677-678. California's flow requirements in this case do not conflict with any congressional *substantive* directives relating to hydropower, and FERC does not argue otherwise.

and instream uses and that the California requirements upset this balance. FERC Br. 43-45. In fact, the FERC license *requires* only that the project maintain minimum levels of instream flows, not that the project divert minimum quantities of water for hydropower purposes. License Order, at 8 (J.A. 25) ("minimum flows"). If, for example, the Rock Creek project voluntarily decreased hydropower diversions in order to increase instream flows, it cannot be seriously argued that the project would violate the terms of its license. Thus, the project is free to *increase* instream flows above the levels required in the license, and is precluded only from *reducing* instream flows below these levels. Therefore, the California requirements, by requiring higher instream flows, do not conflict with the specific *requirements* of the FERC license. Amici American Rivers Br. 10-11.[17]

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[17] The respondents argue that their preemption view is supported by the Electrical Consumers Protection Act (ECPA), 100 Stat. 1243 (1986), which requires FERC in issuing licenses to consider the needs of "fish and wildlife" and also to consider recommendations of "State fish and wildlife agencies." 16 U.S.C. § 797(e), 803(j)(1); FERC Br. 25; Rock Creek Br. 30-32. ECPA specifically does not "affect the rights or jurisdiction of the United States, [or] the States," and does not "alter or establish the respective rights of States, [or] the United States . . . with respect to any water or water-related right." 100 Stat. 1259. Hence, by its own terms, ECPA does not affect state authority under section 27.

Additionally, ECPA contains no "clear congressional directive" precluding the application of state water laws. ECPA requires FERC to give heightened consideration to fish needs, but does not diminish state authority to also consider such needs. Congress ensured that fish needs are protected in states that provide inadequate protection, but did not reduce the authority of states such as California that provide adequate protection. California's flow requirements here are consistent rather than inconsistent with ECPA's goal of protecting fish needs.

Finally, ECPA by its own terms applies only to projects licensed after ECPA's enactment in 1986, 16 U.S.C. § 797(e), and thus does not apply to the Rock Creek project here.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the court below.

Respectfully submitted,

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